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No. 88-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MATSON PLASTERING, INC., a California corporation,
Petitioner,

v.

PLASTERERS AND SHOPHANDS LOCAL NO. 66,
O.P. & C.M.I.A., AFL-CIO, an unincorporated association,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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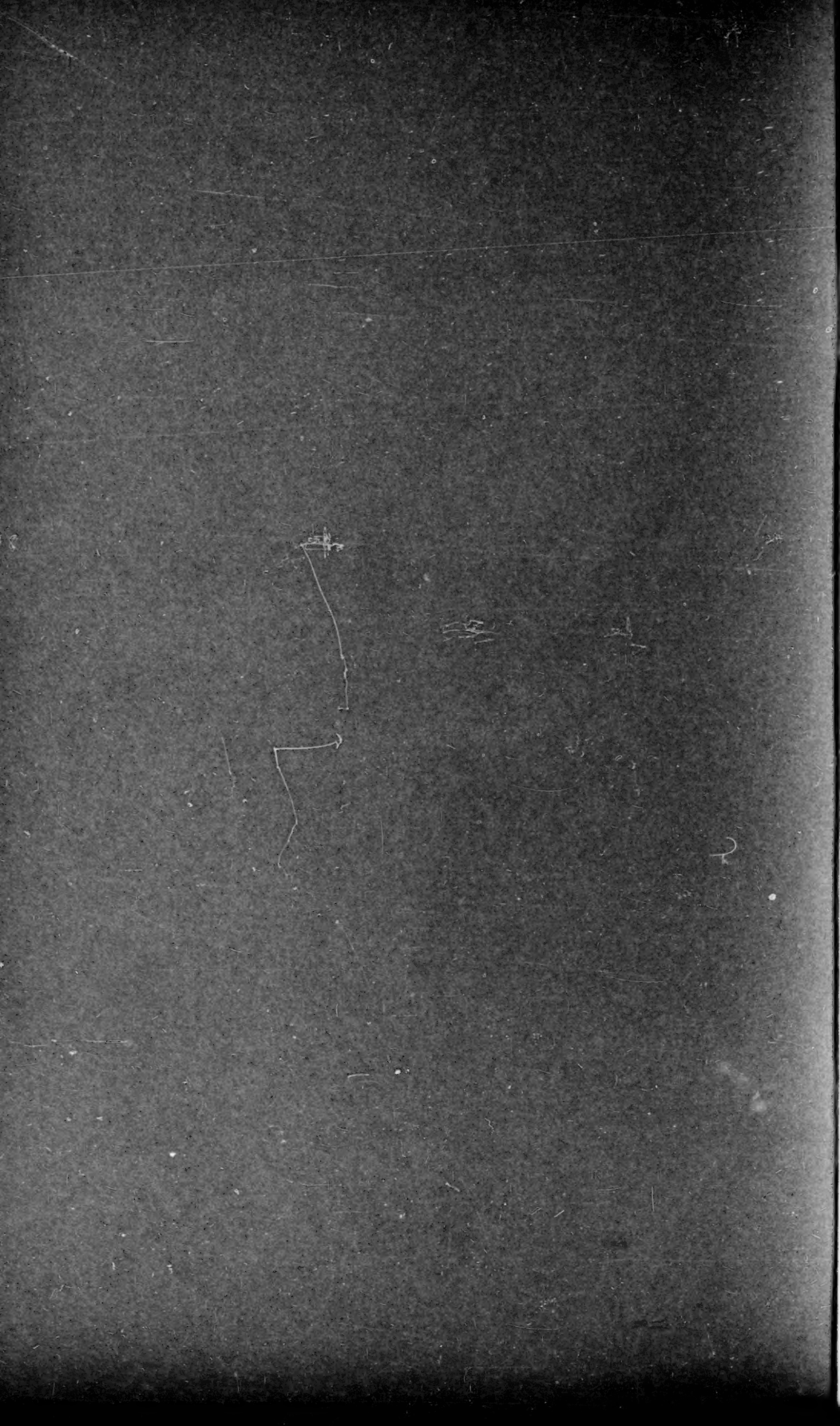

QUESTION PRESENTED

As set forth in the petition, the first two questions assertedly involve waiver of the Section 303 right of action and "loss" of federal jurisdiction. Neither question was presented to or considered by the courts below. Rather, the questions presented and decided below were:

> 1. Is rescission of a collective bargaining agreement available as a remedy in an action brought funder Section 303 of the Labor-Management Relations Act [29 U.S.C. § 187], where the plaintiff alleges that it signed the agreement under the duress of allegedly unlawful secondary conduct?
>
> 2. May a Section 303 plaintiff, after signing a collective bargaining agreement, recover as damages either the wage increase it paid under the agreement or the profits it allegedly lost on future bidding opportunities as a result of losing its non-union status?

Of these, it appears that petitioner Matson Plastering Co. has chosen to present to this Court only the question of the recoverability of the wage increase it paid under the agreement.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The court of appeal's decision herein is reported at 852 F.2d 1200. The district court's decision is reported at 658 F.Supp. 1580.

STATEMENT OF THE CASE

This action was brought under Section 303 of the Labor-Management Relations Act [29 U.S.C. § 187]. It arises from a construction industry labor dispute in which respondent Plasterers Local 66 [1] secured bargain-

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[1] Respondent Plasterers and Shophands Local Union No. 66 is an affiliate of the Operative Plasterers and Cement Masons International Association, AFL-CIO.

ing authorizations from three of the four plasterers employed by petitioner Matson Plastering Co. ("Matson"). When the company refused to recognize and bargain with the Union, Local 66 picketed Matson at the company's jobsite and Matson's plasterers stopped work.

The general contractor designated a reserved gate for Matson's use, but Matson's personnel used all three of the jobsite entrances. Upon observing this use, the Union picketed those three entrances.

The general contractor responded by instructing Matson to remain off the job pending resolution of the matter. The Union stopped picketing. A few hours later Matson reached agreement with the Union and signed the Union's areawide Master Labor Agreement.

The picketing did not cause any work stoppage by any employees of neutral employers.

In the courts below, Matson sought rescission of its collective bargaining agreement and two types of money damages: the difference between the higher wages it paid under the collective bargaining agreement and the wages it had paid before, and the profits it assertedly lost by not being able to bid on future construction projects due to its union signatory status.

The district court granted summary judgment to Local 66 on the grounds that as a matter of law, none of the relief sought by Matson was available under Section 303. The court of appeals affirmed.

The instant petition presents only the question whether the wage differential should be recoverable if Matson could prove a violation of Section 303.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION ADVANCES NO REASONS WHY THE WRIT SHOULD BE GRANTED.

Supreme Court Rule 21.1(j) requires that a petition for certiorari contain, *inter alia*, "[a] direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17." Rule 17.1 describes the principal reasons for discretionary review of a decision of a federal court of appeals as follows:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition argues none of these reasons. In fact, it argues no particular reason why this case deserves the Court's attention. Since it has argued no reason for the exercise of the Court's discretion, the petition should be denied.

II. THERE ARE NO REASONS WHY THE WRIT SHOULD BE GRANTED.

A. The Court Of Appeals' Decision Does Not Conflict With Any Other Court's Decision.

Neither the parties nor the courts below have been able to find any reported decision, official or otherwise, treating the question whether a wage differential like the one in issue here can be recovered under Section 303. Therefore there is no conflict of decisions for the Court to resolve.

B. This Case Does Not Present Questions So Important As To Warrant The Court's Attention.

Section 303 was enacted in 1947 as part of the Taft-Hartley Act [29 U.S.C. §§ 141, *et seq.*]. In forty years of litigation under Section 303, the instant question has not arisen in any case unearthed by the parties or the courts below. This fact alone demonstrates that the question presented is not so important as to merit the Court's attention.

C. The Court Of Appeals' Decision Was Perfectly Sound.

Guided by this Court's decision in *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260 (1964), and after reviewing the decisions of other courts of appeals, the Ninth Circuit found that

> The language of the statute, its legislative history, and judicial interpretation make clear that damages recoverable under section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties as a result of the picketing, but do not include wages paid to employees pursuant to a contract. See Morton, 377 U.S. at 260, 84 S.Ct. at 1258. Other forms of relief are available by filing a complaint with the National Labor Relations

> Board, which has broad remedial powers. See 29 U.S.C. § 160. Matson seeks an order that would ignore the parties' written agreement as to wages and benefits. Matson is clearly not entitled to rescission under section 303; it cannot nullify the entire agreement by recasting its claim as one for damages.

Petition, Appendix A, p. A-6, 852 F.2d 1200, 1203.

The district court was even more succinct, saying that "it seems inconceivable that relief so inconsistent with the policies underlying the labor laws would be available." Petition, Appendix A, p. A-8, 658 F.Supp. 1580.

Respondent Local 66's own approach has been to follow the Ninth Circuit's sound practice of relying on Prosser, *Torts*, 4th Ed. in analyzing causation questions under Section 303. *Mead v. Retail Clerks Local 839*, 523 F.2d 1371, 1379 (9th Cir. 1975), *Frito-Lay, Inc. v. Teamsters Local 137*, 623 F.2d 1354, 1362-1363 (9th Cir. 1980), *Rainbow Tours v. Hawaii Joint Council*, 704 F.2d 1443, 1448 (9th Cir. 1983).

Dean Prosser gives helpful guidance on the instant question:

> It is quite possible, and often helpful, to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?

Prosser, *Torts*, 4th Ed., p. 244

Here the answer is resoundingly in the negative, for the "event" was Matson's signing of the Master Labor Agreement and becoming obligated to pay its plasterers the Agreement's wage rates.

Local 66's duty as a majority bargaining representative was to obtain for Matson's plasterers the best wages and fringe benefits it could reasonably demand: the area standards of the Master Labor Agreement. It had no

duty to protect the employer against the event of becoming signatory. Moreover, an asserted duty to protect the employer from paying higher wages would conflict irreconcilably with the Union's duty to represent the employees.

Under any or all of these approaches, it is plain that the courts below reached the correct result. There is no reason to disturb it.

CONCLUSION

Petitioner offers no reasons why its request for review should be granted. Indeed, there are none.

Respondent respectfully submits that the petition should be denied.

Respectfully submitted,

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